RAJA LOB SHARUDDIN
RAJA AHMAD TERZALI & ORS

v.

SRI SELTRA SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AZMEL MAAMOR JCA
MOHD NOR ABDULLAH JCA
[CIVIL APPEAL NO: W-02-791-05]
14 MARCH 2007

CIVIL PROCEDURE: *Appearance - Non-appearance by plaintiffs - Striking off plaintiffs' actions due to their absence in court - Whether sufficient for plaintiffs' counsel to be present in court*

CONTRACT: *Building contract - Defects - Whether houses purchased not built according to specification - Whether testimony of engineer appointed by plaintiffs to inspect defects of construction of houses lacked credibility - Whether defects discovered after expiry of defect liability period*

EVIDENCE: *Credibility - Assessment of - Testimony of engineer appointed by plaintiffs to inspect defects of construction of houses purchased by plaintiffs - Whether lacked credibility*

EVIDENCE: *Documentary evidence - Report - Written engineering report of inspection of construction of houses not bearing date, name of maker and scope of maker's investigation - Whether ought to be rejected - Accompanying photographs lacking negatives - Whether necessary - Bundle of documents*

CIVIL PROCEDURE: *Documents - Bundle of documents - Written engineering report and accompanying photographs of inspection of construction of houses in bundle - Purpose of - Whether rejection of such documents a misdirection of law*

EVIDENCE: *Documentary evidence - Photographs accompanying report of inspection of construction of houses - Doubts cast on photographs taken - Assessment of weight of evidence - Whether photographs ought to be rejected*

CIVIL PROCEDURE: *Particulars - Material particulars - Building contract - Defects due to non-compliance with plans and by-laws - Whether brought to court's attention for verification*

A ***CONTRACT:*** *Building contract - Terms - Defects - Defect liability clause contained in sale and purchase agreement - Whether must be complied with - Whether defects discovered after expiry of defect liability period*

B The appellants/plaintiffs, each of whom were purchasers of 45 double-storey houses from the respondent/defendant, brought an action against the defendant claiming that the houses they purchased were not built according to specifications, the quality of the materials used was poor and the workmanship was of a low C standard. The learned High Court judge dismissed their claim, resulting in the present appeal. At the commencement of the hearing at the High Court, the learned judge struck off the actions of 12 plaintiffs due to their absence in court. In respect of the remaining plaintiffs, the learned judge ruled that they had failed to D prove their case. He held that the testimony of one Ahmad Kamal Kunji ('PW1'), a professional civil engineer appointed by the plaintiffs to inspect the defects of construction found in their respective houses, lacked credibility. The learned judge's finding was based on the following grounds: (i) PW1's report in encl. 53 E was doubtful as it did not bear any date, the name of the maker and the scope of the maker's investigation; (ii) the accompanying photographs in encls. 54 and 55 were without negatives; (iii) doubts were cast on the photographs taken; and (iv) PW1 had stated that some of the defects highlighted were due to the F defendant not complying with plans and by-laws when constructing the houses. However, the particular plans and by-laws contravened were not brought to the court's attention for verification during trial. The learned judge also accepted the defendant's contention that the plaintiffs' action should fail G because the defects were discovered after the expiry of the Defect Liability Period as a strong ground to reject the plaintiffs' claim.

Held (allowing the appeal)

Per Azmel Maamor JCA delivering the judgment of the court:

H

(1) In a civil action, counsel may appear on behalf of a plaintiff without the need of that plaintiff to be present in court. On record, one Mr Rajadevan appeared on behalf of all the plaintiffs including the 12 absent ones. It was, therefore, I wrong in law to strike out their actions when their counsel was present in court. In light of the very clear misdirection

made by the learned judge in striking out the actions of the 12 plaintiffs on the ground of their absence, that part of the learned judge's decision was reversed and the affected plaintiffs were at liberty to file afresh. (para 4)

(2) PW1 himself gave evidence in court. He himself tendered his report and confirmed its contents. He also confirmed that he himself had inspected the 45 houses in November 1987 and prepared the written report in early 1988. The report should not be rejected merely because it had no date, name of maker and scope of investigation since all these particulars had been given by PW1 himself in his evidence. Such reasons may be valid if PW1 were to tender a report prepared by someone else and he had no knowledge of it. But this was PW1's own report prepared solely by him without the assistance of anybody else and to reject such report merely on those reasons would be unjust, unfair and completely misconceived. Furthermore, the report was in Bundle of Documents B, which meant that both parties to this action had, prior to the commencement of the hearing, agreed to the production and regularity of such documents. What remained to be argued should be confined to the content only and not to the form. Therefore, the learned judge had misdirected himself when he refused to give any consideration to PW1's report in encl. 53. (para 19)

(3) Just like the engineering report, the photographs were documents produced in Bundle of Documents B in encls. 54 and 55. It is a well accepted practice in the civil division of the High Court that Bundle of Documents B are categories of documents where both parties have, before the commencement of hearing, agreed to its production without the need to call the maker. In the light of such agreement, it would no longer be open to either party to question the origin of that document. Since both parties had agreed that the photographs be produced under Bundle of Documents B, the need to produce the negatives would be completely unnecessary. Otherwise, it would defeat the purpose of categorising the documents in Bundle B. In the circumstances, the learned judge had misdirected himself when he rejected the photographs in encls. 54 and 55. (para 20)

(4) As to the 3rd ground which concerned doubts of the photographs taken, this court totally disagreed with the learned judge's ruling for the following reasons: (a) mere suspicion should not and could not be regarded as a valid reason; (b) the wrongful inclusion of one photograph could not be used to invalidate all other photographs produced. It was for the judge to clearly identify those photographs which he satisfactorily found to be wrongful or not relevant; and (c) it would appear as very obvious that the learned judge relied completely on what the defendant alleged to be the condition of the houses based entirely on its assessment of the photographs produced in court. No inspection had been done by any of the defendant's witnesses. On the other hand, PW1 had inspected all the 45 houses before preparing his engineering report and had taken photographs of the defects. Thus, for the learned judge to decide in favour of the defendant went against the overwhelming weight of evidence adduced for the plaintiffs. In the circumstances of this case, in the absence of any engineering report produced by the defendant, the learned judge had misdirected himself when he rejected PW1's report. (para 21)

(5) In respect of the 4th ground, the learned judge, in finding that PW1 did not give particulars of the plans and by-laws contravened by the defendant, had completely overlooked the written statement of PW1. PW1 did state that he based his report on "the Uniform Building By-Laws 1984, Akta 133 and Amalan Baik Pembinaan (Sound Construction Practice)". In addition, PW1 had also made comparisons of the works constructed on the houses with drawing plans, prepared by the architect, engineer and the specifications as mentioned in the contract between the plaintiffs and the defendant. As could be seen in the list of ten defects as found by PW1 in the plaintiffs' houses, PW1 had made use of the above-mentioned comparison eg, defect No. 7, the thickness of the wall separating the houses in conformity with the Uniform Building By-Laws 1984, Act 133 is nine inches whereas the defendant only constructed a 4 1/2 inch separation wall, and the measurement between the floor level of a master bedroom and that of the bathroom according to the plan should be two inches whereas the defendant only constructed less than 0.5 inch difference (defect No. 1). Having regard to the list of ten defects found by PW1, the finding of the learned judge on this issue could not be supported. (paras 22 & 23)

(6) The Defect Liability Clause was contained under cl. 23 of the Sale and Purchase Agreement, and all provisions in a sale and purchase agreement are actually statutory requirements that must be strictly complied with. Clause 23, in particular, is meant to be additional protection for house buyers without affecting or limiting their rights under the common law. On the basis of the rulings made in the cases of *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* and *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors*, the reliance by the defendant on the Defect Liability Period as a defence should be totally rejected. Here again, the learned judge had misdirected himself in law. (paras 24, 25 & 26)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu/plaintif-plaintif, yang setiap dari mereka adalah pembeli 45 buah rumah berkembar dua tingkat dari responden/defendan, memulakan tindakan terhadap defendan menuntut bahawa rumah-rumah yang mereka beli tidak dibina menurut spesifikasi, dan menggunakan bahan-bahan dan mutu hasil kerja yang tidak berkualiti. Yang arif hakim Mahkamah Tinggi menolak tuntutan dan plaintif-plaintif merayu. Di permulaan pendengaran di Mahkamah Tinggi, yang arif hakim telah membatalkan tindakan-tindaka 12 orang plaintif atas ketidakhadiran mereka di mahkamah. Berkaitan plaintif-plaintif lain, yang arif hakim memutuskan bahawa mereka telah gagal membuktikan kes mereka. Menurut yang arif hakim, testimoni Ahmad Kamal Kunji ('PW1'), seorang jurutera sivil profesional yang dilantik oleh plaintif-plaintif untuk memeriksa kecacatan-kecacatan pembinaan pada rumah-rumah, adalah tidak boleh dipercayai. Dapatan yang arif hakim ini adalah diasaskan kepada alasan-alasan berikut: (i) laporan PW1 di dalam lampiran 53 boleh dipertikai kerana tidak bertarikh, tidak menunjukkan siapa pembuatnya dan skop penyiasatannya; (ii) gambar-gambar yang dilampir di dalam lampiran-lampiran 54 dan 55 tidak mempunyai negatif; (iii) gambar-gambar tersebut adalah disangsikan; dan (iv) PW1 telah menyatakan bahawa sebahagian dari kecacatan-kecacatan yang ditonjolkan adalah disebabkan defendan tidak mematuhi pelan-pelan dan undang-undang kecil, tetapi pelan-pelan dan undang-undang kecil tersebut tidak dikemukakan ke mahkamah untuk penelitian dan pengesahan. Yang arif hakim juga menerima hujah defendan yang menyatakan tindakan plaintif-plaintif harus gagal kerana kecacatan-kecacatan hanya ditemui selepas tamatnya Tempoh Liabiliti Kecacatan. Menurut yang arif hakim itu adalah satu alasan yang kukuh untuk menolak tuntutan plaintif-plaintif.

Diputuskan (membenarkan rayuan)
Oleh Azmel Maamor HMR menyampaikan penghakiman mahkamah:

(1) Dalam tindakan sivil, peguam boleh mewakili seorang plaintif tanpa plaintif tersebut menghadirkan diri di mahkamah. Di atas rekod, seorang Mr Rajadevan mewakili semua plaintif-plaintif termasuk 12 orang yang tidak hadir. Oleh itu, adalah salah di sisi undang-undang untuk membatalkan tindakan mereka bilamana peguam mereka hadir di mahkamah. Mengambilkira salah arahan yang jelas oleh hakim bicara dalam membatalkan tindakan ke 12 plaintif tersebut kerana ketidakhadiran mereka, bahagian keputusan yang arif hakim yang berkaitan adalah diakas dan plaintif-plaintif terbabit bebas untuk memfail semula.

(2) PW1 sendiri memberi keterangan di mahkamah. Beliau sendiri telah mengemukakan laporannya dan mengesahkan kandungannya. Beliau juga mengesahkan bahawa beliau sendiri yang memeriksa semua 45 buah rumah pada November 1987 dan menyediakan laporan bertulis pada awal 1988. Oleh itu, laporannya tidak harus ditolak semata-mata kerana ia tidak bertarikh dan tidak mencatatkan nama pembuat atau skop penyiasatan, kerana semua butir-butir tersebut telah diberi oleh PW1 sendiri dalam keterangannya. Alasan-alasan yang arif hakim mungkin boleh diterima jika PW1 mengemukakan laporan yang disediakan oleh seorang lain dan tidak mempunyai pengetahuan mengenainya. Tetapi laporan adalah laporan PW1 sendiri yang disediakan oleh beliau tanpa bantuan siapa-siapa dan untuk menolak laporan berkenaan semata-mata atas alasan-alasan yang dikatakan adalah tidak adil dan salah. Selain itu, laporan berada di dalam Ikatan Dokumen B, yang bermakna kedua-dua pihak kepada tindakan telah bersetuju dengan pengemukaan dan keteraturannya sebelum perbicaraan bermula lagi. Maka apa yang boleh dihujahkan harus terhad kepada kandungan sahaja dan bukan bentuknya. Oleh itu, yang arif hakim telah tersalah arah akan dirinya bilamana enggan memberi sebarang pertimbangan kepada laporan PW1 di lampiran 53.

(3) Sama seperti laporan kejuruteraan, gambar-gambar adalah dokumen yang terdapat di Ikatan Dokumen B lampiran-lampiran 54 dan 55. Menjadi amalan yang diterima pakai di Bahagian Sivil Mahkamah Tinggi bahawa Ikatan Dokumen B adalah kategori dokumen di mana pihak-pihak telah pun, sebelum perbicaraan bermula, bersetuju mengenai

pengemukaannya tanpa perlu memanggil pembuat-pembuat dokumen tersebut. Mengambilkira persetujuan sedemikian, adalah tidak terbuka bagi mana-mana pihak untuk mempersoalkan asal usul dokumen berkenaan. Di sini, oleh kerana kedua pihak telah bersetuju bahawa gambar-gambar dikemukakan melalui Ikatan Dokumen B, maka keperluan untuk mengemukakan negatif sudah tidak lagi perlu. Jika sebaliknya, ia akan mensia-siakan tujuan mengkategorikan dokumen-dokumen di dalam Ikatan B. Oleh yang demikian, yang arif hakim telah tersalah arah akan dirinya bilamana beliau menolak gambar-gambar di lampiran 54 dan 55.

(4) Berhubung alasan ketiga yang bersabit dengan kesangsian terhadap gambar-gambar yang diambil, mahkamah ini sepenuhnya tidak bersetuju dengan dapatan yang arif hakim atas alasan-alasan berikut: (a) kesangsian semata-mata tidak harus dan tidak boleh dianggap sebagai suatu alasan yang sah; (b) kemasukan secara salah sekeping gambar tidak boleh digunakan untuk menolak semua gambar-gambar lain yang dikemukakan. Menjadi tanggungjawab hakim untuk mengenalpasti dengan jelas gambar-gambar yang beliau dapati sebagai salah diambil atau tidak relevan; dan (c) agak jelas bahawa yang arif hakim bergantung sepenuhnya kepada apa yang didakwa defendan sebagai keadaan rumah-rumah berdasarkan penilaiannya terhadap gambar-gambar yang dikemukakan di mahkamah. Tiada pemeriksaan dijalankan oleh mana-mana saksi defendan. Sebaliknya, PW1 telah memeriksa kesemua 45 buah rumah sebelum menyediakan laporan kejuruteraannya mengenai kecacatan. Oleh itu, yang arif hakim, dengan memutus secara yang berpihak kepada defendan, telah menongkah arus keterangan kukuh yang dikemukakan oleh plaintif-plaintif. Dalam halkeadaan kes, dan dalam ketiadaan laporan kejuruteraan yang dikemukakan oleh defendan, yang arif hakim telah tersalah arah akan dirinya apabila menolak laporan PW1.

(5) Mengenai alasan keempat, yang arif hakim, dalam mendapati PW1 tidak mengemukakan butir-butir pelan dan undang-undang kecil, telah terlepas pandang sepenuhnya kenyataan bertulis PW1. PW1 ada menyatakan bahawa berdasarkan laporannya mengenai "the Uniform Building By-Laws 1984, Akta 133 and Amalan Baik Pembinaan (Sound Construction Practice)". Begitu juga, PW1 telah membuat perbandingan-perbandingan antara kerja-kerja yang dilaksana terhadap rumah-

A rumah dengan lakaran pelan-pelan yang disediakan oleh arkitek, jurutera dan spesifikasi-spesifikasi seperti yang disebut di dalam kontrak di antara plaintif-plaintif dan defendan. Seperti yang dapat dilihat dari senarai 10 kecacatan yang dijumpai oleh pada rumah plaintif-plaintif, PW1 telah menggunakan
B perbandingan-perbandingan di atas, contohnya kecacatan No. 7, ketebalan dinding yang memisahkan rumah-rumah yang mematuhi Uniform Building By-Laws 1984, Akta 133 adalah sembilan inci sementara defendan hanya membina dinding pemisah setebal 4½ inci, dan ukuran di antara aras lantai bilik
C utama berbanding dengan bilik mandi menurut pelan sepatutnya adalah dua inci sedangkan defendan hanya membina kurang dari 0.5 inci perbezaan (kecacatan No. 1). Mengambilkira senarai 10 kecacatan yang dijumpai oleh PW1, dapatan yang arif hakim atas isu ini tidak boleh disokong.

D

(6) Fasal Liabiliti Kecacatan terkandung di dalam kl. 23 Perjanjian Jual Beli. Kesemua peruntukan di dalam perjanjian jual beli adalah sebenarnya kehendak statutori yang mesti dipatuhi dengan ketatnya. Klausa 23 khususnya dimaksudkan untuk
E memberi perlindungan tambahan kepada pembeli-pembeli rumah tanpa menjejaskan atau menghadkan hak-hak mereka di sisi undang-undang common. Berdasarkan keputusan yang dibuat di dalam kes-kes *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* dan *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors*,
F kebergantungan defendan ke atas Tempoh Liabiliti Kecacatan sebagai suatu pembelaan harus ditolak sepenuhnya. Di sini juga, yang arif hakim telah sekali lagi tersalah arah akan dirinya di sisi undang-undang.

Case(s) referred to:

G *City Investment Sdn Bhd v. Korperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69* ***(foll)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1996] 2 CLJ 1105 HC ***(foll)***

H **Legislation referred to:**

Housing Developers (Contract and Licensing) Regulations 1982, reg. 12(1)

For the appellants - Mr Rajadevan; M/s Rajadevan & Assoc
For the respondent - N Selvam; M/s N Selvam & Co

I *[Appeal from High Court, Kuala Lumpur; Suit No: S1-22-228-1992]*

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor JCA:

[1] The appellant/plaintiffs, each of whom were the purchasers of 45 double-storey terrace houses from the respondent/defendant brought action against the defendant claiming that the houses they purchased were not built according to specifications, the quality of the materials used was poor and the workmanship was of a low standard. The learned High Court Judge dismissed their claim. On appeal to this court we unanimously allowed their appeal, we now state our grounds.

Facts Of The Case

[2] The plaintiffs purchased from the defendant double storey terrace houses in Taman Nirwana Fasa 2, Ampang, Selangor. Vacant possession of those houses were delivered to the plaintiffs sometime in early 1987. Subsequent to the delivery the plaintiffs complained against the defendant that their houses were not built according to specifications, the quality of materials used was poor and the workmanship was of a low standard. In support of their contention, the plaintiffs engaged an engineer, (PW1) who prepared a report detailing the defects found by him on those 45 houses. PW1 also produced photographs showing the nature of those defects. In his evidence PW1 stated the costs to make good those defects would be in the region between RM14,000 and RM20,000. In the statement of claim, however, the plaintiffs claim a sum of not more than RM25,000.

Decision Of Judge At Commencement Of Hearing

[3] At the commencement of hearing 12 plaintiffs who were the owners of 12 houses were not present in court. They were Plaintiffs No. 3, 6, 11, 13, 17, 20, 23, 28, 33, 37, 41 and 44. Because of their absence the learned judge struck off their actions.

[4] In our view the decision of the learned judge was not proper. In a civil action a counsel may appear on behalf of a plaintiff without the need of that plaintiff to be present in court. On record Mr. Rajadevan appeared on behalf of all the plaintiffs including the 12 absent plaintiffs. It is therefore wrong in law to strike out the plaintiffs' actions when their counsel was present in court. The presence of a plaintiff is not essential in a civil action. So long as someone is present in court on his behalf it would not be lawful for the court to strike out the plaintiff's action. His

presence would become necessary if he is required to give evidence. In a civil action it is not uncommon where other persons give evidence on behalf of the plaintiff without the plaintiff himself giving evidence. In the light of very clear misdirection made by the learned judge in striking out the actions of the said 12 plaintiffs on the ground of their absence we therefore ruled that that part of decision of the learned judge be reversed and the affected plaintiffs are at liberty to file afresh.

Hearing In Respect Of Remaining Plaintiffs

[5] The proceedings in respect of the remaining plaintiffs proceeded with 2 witnesses being called on behalf of the plaintiffs. The 1st witness, Hj. Ahmad Kamal Kunji (PW1), a professional civil engineer registered with Lembaga Jurutera Malaysia with 25 years experience behind him testified that he was appointed by the plaintiffs to do an inspection regarding the defects of construction found in their respective 45 houses. So an inspection of all the parts of the 45 houses was carried out by PW1 himself. This was done sometime in November 1987. However he only completed writing his engineering report in early 1998 which was produced in Ikatan Dokumen Bundle B – (encl. 53). As regards of the basis of his investigation, PW1 said:

> Asas-asas kajian adalah berdasarkan pembinaan yang telah dibuat berbanding dengan pelan-pelan lukisan pihak pemaju iaitu lukisan akitek, lukisan jurutera, spesifikasi kontrak diantara pemaju dan pemborong, Uniform Building By-Laws 1984, Akta 133 dan Amalan Baik Pembinaan (Sound Construction Practice). Saya juga telah melantik firma Perunding yang boleh membuat kajian lantai iaitu Malaysian Soil Investigation telah menjalankan pemeriksaan pada 27hb. Mac 1998 dan telah memajukan laporan kajian.

A soil Investigation Report was produced in Ikatan Dokumen Bundle B (encl. 56). Photographs were also taken by PW1 during his inspection of the houses and these were produced in Ikatan Dokumen Bundle B (encls. 54 and 55).

[6] PW1 identified 10 types or defects found in the plaintiff's houses:

> (1) Pembinaan rumah tidak menepati pelan yang disediakan – contohnya ukuran beza paras lantai di antara bilik master dengan lantai bilik air sepatutnya minima 2 inci tetapi pembinaannya tidakpun sampai 0.5 inci. Fungsi beza paras adalah supaya air tidak melempah ke ruang bilik tidur semasa bilik mandi gunakan;

(2) Pembinaan rumah tidak dilaksanakan dengan betul dimana terdapat keretakan yang serius kerana keretakan dibeberapa tempat didinding menembusi dari lapisan atas hingga bawah;

(3) Ketebalan lantai tidak menepati spesifikasi amalan dimana ketebalan driveway konkrit 60mm berbanding dengan amalan biasa 100mm dan kualiti hardcore iaitu batu pelapik tidak menepati spesifikasi iaitu kandungan tanah pasir melebihi komposisi batu;

(4) Teknik susun atur kerja pembinaan lantai dibahagian lantai tidak betul kerana terdapat lapisan pemisah pasir diantara konkrit, yang membawa erti mosaic berasaskan lapisan tidak kukuh;

(5) Kualiti workmanship terlalu rendah dimana pembinaan dinding senget dan kerja plastering terlalu kasar menyebabkan permukaan didinding berombak;

(6) Kerja-kerja mengecat besi tidak diamalkan dengan betul menyebabkan premature corrosion dimana karatan tidak sepatutnya timbul didalam tempoh lima tahun yang pertama;

(7) Pembinaan dinding pemisah tidak menepati Uniform By-Law dimana ketebalannya sepatutnya 9 inci dan pembinaan yang sedia ada 4 1/2 inci dan terdapat lubang didalam siling diantara kedua rumah, kelemahan ini didalam siling diantara kedua rumah, kelemahan ini tidak mencapai ciri-ciri keselamatan semasa kebakaran;

(8) Pembinaan lantai tidak dilaksanakan dengan betul dimana terdapat serapan air dari lantai bilik air atas yang dilihat dari tingkat bawah;

(9) Applikasi cat kayu pada siling tidak menepati spesifikasi dimana cat yang digunakan sepatutnya cat yang berasaskan minyak tetapi cat yang berasaskan air telah digunakan; dan

(10) Dinding seramik tidak dialas dengan simen sepenuhnya menimbulkan implikasi kepingan seramik mudah pecah kalau terhentak.

In PW1's view those defects were serious defects and they were structural defects to the houses. PW1 also said such defects were the type that would only become apparent at a late stage. Such defects would not appear immediately. PW1 further said that the defects of the 45 houses were almost similar to one another, with minor variations.

[7] The other witness called for the plaintiffs was Raja Lob Sharuddin (PW2). He is the 1st plaintiff in this action. In his evidence PW2 said that he was given vacant possession of his house by the defendant in early 1987. After staying in the house for some time he found a number of defects had developed in the house. Originally he found water seeping through the walls in the upper and lower floors. He then verbally informed the defendant of the defect. But no action was taken by defendant. Sometime later more defects appeared. The only remedial work carried out by the defendant was to repaint the walls of the plaintiff's house. Not satisfied with the defendant's action, PW2 together with the other plaintiffs engaged the services of PW1 to make an inspection and prepare a report in respect of the defects that occurred on the 45 houses of the plaintiffs.

[8] The defendant as stated in the statement of defence put up defence of denial. Two witnesses were called to give evidence on behalf of the defendant. DW1, Foo Wan Hong, was the Executive Director of the defendant. The gist of what he said was that in carrying out the development at Taman Nirwana the defendant had obtained all the required planning and development approvals from the relevant government agencies and the defendant had also engaged professional consultants, like Architect, Quantity Surveyor, Civil and Structural Engineer, Electrical Engineer and the Main Contractor. As to the materials used the defendant followed the appropriate materials according to the advice given by the Architect. DW1 said no low quality materials were used.

[9] As to the appointment of the main contractor DW1 said that their emphasis was based mainly on experience, good name of the candidate in the construction industry as well as perusing their work records. On the basis of the above qualification defendant engaged Kenco Construction Sdn. Bhd. as their main contractor. As regards the defects found on the 45 houses of the plaintiffs, DW1 did not say anything at all.

[10] The other defence witness, Yeow Ah Kow (DW2), was the site agent of the main contractor, Kenco Construction Sdn. Bhd. His main function was to oversee the whole construction from beginning until completion. Kenco Construction was involved as the main contractor with the construction of Taman Nirwana from Phase I since 1975 for the housing development projects carried out by the defendant. His evidence centred mainly on how the construction of the housing project were carried out.

[11] As regards the photographs produced in encls. 54 and 55 of Ikatan Dokumen Bundle B, DW2 said the photographs were taken after many years had elapsed since vacant possession was given. The defects could not be there during the defects liability period. In his testimony DW2 did not say that he had inspected the plaintiff's houses to verify the defects alleged.

[12] We have noted that the defendant did not call any professional engineer to give evidence to dispute the engineering report produced by PW1 as regards the defects found on the plaintiffs' houses.

Plaintiffs' Contention

[13] The plaintiffs contended that the testimony of PW1 was very clear as to the existence of defects to the plaintiffs' houses. The defendant failed to cross-examine PW1 as regards the defects. As such the evidence of PW1 should be taken as undisputed fact by the court. Furthermore the evidence of PW1 was supported by the evidence of PW2. In addition to that PW1 had produced a report of the defects found on the 45 houses and had also taken photographs of the defects at the time when he made his inspection of the houses in November 1987. The period of eligibility of the plaintiffs to make claim against the defendant is not confined to the defects liability period only. Under common law the plaintiffs are entitled to bring action even after the defect liability period had expired.

Defendant's Contention

[14] The defendant questioned the credibility of PW1 and the report he produced as it contained so many weaknesses. The defendant also questioned the photographs produced on the ground that the negatives were not produced by PW1. The defendant alleged that the plaintiffs had no proof that the report was prepared in November 1987. The defendant alleged that the defects appeared well after the detects liability period and therefore the plaintiffs had no cause of action against the defendant.

Findings Of The High Court

[15] The learned judge agreed with the defendant that PW1's testimony lacked credibility. His findings were based on the followings:

(1) PW1's report in encl. 53 was doubtful. The report did not bear any date, name of maker nor the scope of his investigation.

(2) The accompanying photographs in encls. 54 and 55 were without negatives.

(3) The photographs taken were in doubt:

(i) There were 3 sets of photographs taken by PW1 at different periods when he was conducting the inspection of the houses. Strong suspicions were cast on whether some of them were included to improve the plaintiffs' claim rather than a reflection of the actual situation when the examination of the houses was undertaken in 1987;

(ii) One of the photographs shows a newspaper advertisement spread on the floor in one of the houses with the words "Kongsi Raya" printed across. This celebration could only have occurred in this country commencing from 1996 to 1999;

(iii) Any doubt relating to the time taken when they were taken naturally reflects on the authenticity of the plaintiffs' claim;

(iv) The photographs show their premises were well lived in. On many parts of the wall and drains there were fungus and stains which could only be brought after a substantial period of time.

(4) PW1 had stated that some of the defects highlighted were due to the defendant not complying with plans and By-laws when constructing the houses. But which particular plans and By-laws contravened were not brought to the attention of the court for verification during trial.

Ruling Of The High Court

[16] The learned judge ruled that the plaintiffs have failed to prove their case. As such he dismissed the plaintiffs' claims with costs.

Finding Of This Court

[17] It is trite law that an appellate court will not readily interfere with the findings of facts arrived at the trial court to which the law entrusts the primary task of evaluation of the evidence.

However, the appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one may say that no reasonable court which had properly directed itself and, asked the correct questions would have arrived at the same conclusion. See *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545.

[18] It is true that in this case the success of the plaintiffs' claim hinges very much on the acceptability of the report made by PW1, the engineer. The learned judge found PW1's testimony to be lacking in credibility and gave 5 main reasons for arriving at that conclusion. We are unable to agree with the learned judge in his ruling that PW1's evidence lacked credibility.

[19] We first of all, deal with the allegation that PW1's report did not bear any date, name of maker nor the scope of his investigation. At the outset, it must be remembered that PW1 himself gave evidence in court. He himself tendered his report and confirmed its content. He also confirmed that he himself inspected the 45 houses in November 1987 and prepared the written report in early 1988. That PW1 by himself alone prepared the report without the involvement of any other person, and he himself gave evidence in court and himself tendered the report we fail to find any good reason why the report should be rejected merely because it had no date, name of maker and scope of his investigation. There should not be any mystery whatsoever as to the name, date or scope of his investigation since all these particulars had been given by PW1 himself in his evidence. Such reasons may be valid if PW1 were to tender a report prepared by someone else and he had no knowledge of it. But this is PW1's own report prepared solely by him without the assistance of anybody else. To reject such report merely on those reasons would be unjust, unfair and completely misconceived. Furthermore, the report was included in Bundle of Document B. A document included in Bundle B means both parties to this action had, prior to the commencement of the hearing, agreed to the production and regularity of such document. What remain to be argued should be confined to the content only and not to the form. We therefore feel that the learned judge had misdirected himself when he refused to give any consideration to PW1's report in encl. 53.

[20] Secondly, the learned judge rejected the photographs in encl. 54 and 55 because the negatives were not produced in court. Here again the learned judge had misdirected himself. Just like the

engineering report the photographs were documents produced in Bundle of Document B in encls. 54 and 55. It is a well accepted practice in the Civil Division of the High Court in Kuala Lumpur that Bundle of Documents B are categories of documents where both parties have, before the commencement of hearing, agreed to its production without the need to call the maker. In the light of such agreement it would no longer be open to either party to question the origin of that document. Since the photographs had been agreed by both parties to be produced under Bundle of Document B the need to produce the negatives would be completely unnecessary, otherwise it would defeat the purpose of categorising the documents in Bundle B. And if a document is put in Bundle A, where the parties have agreed to its production and content, no party would be allowed to ask any question at all on that document. In the circumstances we ruled that the learned judge had misdirected himself when he rejected the photographs.

[21] As to the 3rd ground, we find ourselves in total disagreement with ruling of the learned judge. Our reasons are as follows:

(i) It is trite that mere suspicion should not and could not be regarded as a valid reason;

(ii) Wrongful inclusion of one photograph cannot be used to invalidate the entire photographs produced. It is for the judge to clearly identify those photographs which he satisfactorily found to be wrongful or not relevant;

(iii) It is trite law that no witness giving evidence would appear to give 100% truth. And if that should happen then the likelihood of such evidence being concocted would be very probable. It is also trite that an apparent doubt on certain part of a witness's testimony would not be a ground to reject his entire evidence;

It would appear as very obvious that the learned Judge relied completely on what the Defendant alleged to be the condition of the houses based entirely on their assessment of the photographs produced in court. No inspection had been done by any of the Defendant witnesses. On the other hand PW1, an engineer, had inspected all the 45 houses before preparing his engineering report and had taken the photographs of the defects. PW1's evidence had been supported by the evidence of PW2. For the learned Judge to decide in favour of the Defendant relying entirely on PW2's comment on the photographs produced would be completely against the overwhelming weight of evidence

> adduced for the Plaintiffs and as such we find it very difficult to accept. Short of making actual inspection of the defects to the houses it would be highly unconceivable how any could make a conclusion that a report on defects based on full inspection could be rejected by the court. What the Defendant should have done was to call a witness with engineering qualification to inspect the Plaintiffs' houses and produce a report disputing PW1's report on the defects. In such a situation the learned Judge would be in a better situation which report to accept. In the circumstances of this case we could not find any reason why PW1's report should be rejected. It is in evidence that PW1 was a qualified civil engineer, registered with Lembaga Jurutera Malaysia and had 25 years experience as an engineer specialising in the field of engineering consultancy on building matter. With such credentials and in the absence of any engineering report produced by the Defendant the learned Judge had misdirected himself when he rejected the report of PW1.

[22] In respect of the 4th ground, the learned judge found that PW1 (the engineer) did not give particulars of the plans and by-laws that the defendant had contravened. This is where we felt the learned judge had completely overlooked the written statement of PW1. In his answer to Question No. 12, PW1 did state that he based his report on "the Uniform Building By-Laws 1984, Akta 133 and Amalan Baik Pembinaan (Sound Construction Practice)". In addition to the above PW1 had also made comparisons of the works constructed on the houses with drawing plans, prepared by the architect, engineer and the specifications as mentioned in the contract between the plaintiffs and the defendant. As can be seen in the list of 10 defects as found by PW1 on the plaintiffs' houses, PW1 had made use of the above said comparison eg defect No. 7 the thickness of the wall separating the houses in conformity with the Uniform Building By-Laws 1984, Act 133 is 9 inches whereas the defendant only constructed a 4 1/2 inch separation wall and the measurement between the floor level of a master bedroom and that of the bathroom according to the plan should be 2 inches whereas the defendant only constructed less than 0.5 inch difference (Defect No. 1).

[23] Having regard to the list of 10 defects found by PW1 as stated earlier in this judgment we are unable to support the finding of the learned judge on this issue.

Defect Liability Period

[24] The defendant strenuously contended that the plaintiffs' action should fail because the defects were discovered after the expiry of the Defects Liability Period. The learned judge had also accepted this as a strong ground to reject the plaintiffs' claim. The Defect Liability Clause is contained under cl. 23 of the Sale and Purchase agreement which reads:

> 23. Any defect, shrinkage or other faults in the building which shall become apparent within a period of twelve (12) calendar months after the date of delivery of vacant possession to the Purchaser and which are due to defective workmanship or materials or the said Building not having been constructed in accordance with the said specifications and plans as approved by the Appropriate Authority (amended for unamended as the case may be) shall be repaired and made good by the Vendor at his own cost and expense within one month of its having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the Building have not been made good by the Vendor, the Purchaser shall be entitled to recover from the Vendor the costs of making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor:
>
> Provided that the Purchaser shall at any time after the expiry of the said period of one month notify the Vendor of the cost of carrying out any works to make good the said defects, shrinkage or other faults before the commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

The question that we have to determine is whether this cl. 23 should be construed and applied against purchasers of houses. To do that it would be incumbent upon us to trace the purpose for which cl. 23 was originally created. It began with the passing of the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder. In 1982 the Housing Developers (Contract and Licensing) Regulations came into force. And reg. 12(1) of Regulation 1982 provides that every contract of sale for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto shall be in the form as prescribed in Schedule E. Regulation 12(1) further provides that no amendment to any such contract of sale shall be made except on the ground of hardship or necessity and with the

prior approval of the controller. In other words all the provisions in the sale and purchase agreement are actually statutory requirements which must be strictly complied with. Clause 23, in particular, is meant to be an additional protection for house buyers, without affecting or limiting their rights under the common law. This was the ruling made by the Privy Council in *City Investment Sdn. Bhd. v. Korperasi Serbaguna Cuepacs Tanggungan Bhd.* [1988] 1 MLJ 69. In that case Lord Templeman said:

> But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

[25] In the Federal Court case of *Teh Khem On & Anor v. Yeoh & Wu Development Sdn. Bhd. & Ors.* [1996] 2 CLJ 1105, Peh Swee Chin FCJ said:

> Again, the vendor/builder and in fact, other defendants, all have joined in a common submission by way of defence that the damage occurred after the defect liability period mentioned in cl. 23 of P1. I share the view espoused by Lord Denning in *Hancock & Ors v. Bul Brazier Ltd* [1966] 2 All ER 901; [1966] 1 WLR 1317, to the effect that such clause similar to cl. 23 in our instant appeal about making good structural defects discovered within six months would not take away the right to sue in respect of such defects which were not discoverable with such six months, and that further in regard those defects discovered within the six months, the provision of an express remedy of making good the same defects will not *ipso facto* take away the rights of any purchaser which normally follow at common law in the case of a breach of contract. It is pertinent to mention that our cl. 23 provides for 12 months instead of six months. The same principles would apply. Thus the said line of defence also fails.

[26] On the basis of the ruling made by the above two cases the reliance of the Defect Liability Period as a defence by the defendant should be totally rejected. Here again the learned judge had misdirected himself in law.

[27] In the light of the circumstances mentioned above we allowed the appeal by the plaintiffs with costs here and the court below. We also ordered that the damages accrued to each of the plaintiffs' be assessed by the Senior Assistant Registrar.